Supreme Court, U.S.
FILED

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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

FRANK SARACO and 800 OTHER SIMILARLY SITUATED INDIVIDUALS,
Petitioners,

v.

THE UNITED STATES and GEORGE WEISE in his capacity as COMMISSIONER, UNITED STATES CUSTOMS SERVICE.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal district courts may assert jurisdiction pursuant to 28 U.S.C. 1331, and independent of the Tucker Act, where monetary claims are brought against the United States under a statute, such as the Fair Labor Standards Act, that provides its own waiver of sovereign immunity.

PARTIES TO THE PROCEEDINGS

The parties to this proceeding below were Frank Saraco, 800 other similarly situated individuals, whose names are set forth in Pet. App., *infra* at 39a to 49a, the United States, George Weise, in his capacity as the Commissioner of the United States Customs Service, and James King, in his capacity as the Director, Office of Personnel Management.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	5
CONCLUSION	13
APPENDIX A	1a
APPENDIX B	8a
APPENDIX C	9a
APPENDIX D	11a
APPENDIX E	36a
APPENDIX F	39a
APPENDIX G	50a

TABLE OF AUTHORITIES

Cases — Page

American Federation of Government Employees v. Office of Personnel Management, 821 F.2d 761 (D.C. Cir. 1987) 12
Bor-Son Building Corporation v. Heller, 572 F.2d 174 (8th Cir. 1978) 8
Bowen v. Massachusetts, 487 U.S. 879 (1988) ..... *passim*
Brooks v. Weinberger, 637 F. Supp. 22 (D.D.C. 1986) 11
C.H. Sanders Co. v. BHAP Housing Development Fund Co., 903 F.2d 114 (2d Cir. 1990) 4, 9, 10
Davila v. Weinberger, 600 F. Supp. 599 (D.D.C. 1985) 11
Exxon Corp. v. Federal Trade Commission, 588 F.2d 895 (3d Cir. 1978) 11
Eastport S.S. Corp. v. United States, 372 F.2d 1002 (Ct. Cl. 1967) 5
Ferguson v. Union National Bank of Clarksburg, 126 F.2d 753 (4th Cir. 1942) 8
Ghent v. Lynn, 302 F. Supp. 878 (D. Conn. 1975) 8
Graham v. Henegar, 640 F.2d 732 (5th Cir. 1981) 6
Hubbard v. Environmental Protection Agency, 982 F.2d 531 (D.C. Cir. 1992) (*en banc*) 4
Marcus Garvey Square, Inc. v. Winston Burnett Construction Co., 595 F.2d 1126 (9th Cir. 1979) 9
Mitchell v. United States, 930 F.2d 893 (Fed. Cir. 1991) 7
Munoz v. Small Business Administration, 644 F.2d 1361 (9th Cir. 1981) 9
Pacificorp v. Federal Energy Regulatory Commission, 795 F.2d 816 (9th Cir. 1986) 9
Parker v. King, 935 F.2d 1174 (11th Cir. 1991), *cert. denied*, 505 U.S. 1229 (1992) 10
Portsmouth Redevelopment and Housing Authority v. Pierce, 706 F.2d 471 (4th Cir.), *cert. denied*, 464 U.S. 392 (1983) 9
Spectrum Leasing Corp. v. United States, 764 F.2d 891 (D.C. Cir. 1985) 9

TABLE OF AUTHORITIES—Continued

	Page
Trans-Bay Engineers & Builders, Inc. v. Hills, 551 F.2d 370 (D.C. Cir. 1976)	8, 10
United States v. Hohri, 482 U.S. 64 (1987)	12
United States v. Mitchell, 463 U.S. 206 (1983)	5
United States v. Testan, 424 U.S. 392 (1976)	5
Ward v. Brown, 22 F.3d 516 (2d Cir. 1994)	5, 7, 9, 10
Zumerling v. Devine, 769 F.2d 745 (Fed. Cir. 1985)	4, 7

Statutes and Regulations

5 U.S.C. § 5596	7
12 U.S.C. § 1702	8, 10
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1292(d)(4)(A)	3, 10
28 U.S.C. § 1331	*passim*
28 U.S.C. § 1332	8
28 U.S.C. § 1346(a)(2)	*passim*
28 U.S.C. § 1391(e)(4)	11
28 U.S.C. § 1402(a)	3
28 U.S.C. § 1402(a)(1)	11
28 U.S.C. § 1442(a)(1)	8
28 U.S.C. § 1491	5
29 U.S.C. § 216(b)	*passim*

Miscellaneous

S. Rep. No. 275, 97th Cong., 2d Sess. (1982)	12

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Frank Saraco and 800 other similarly situated individuals, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is published at 61 F.3d 863. The order of the court of appeals denying a petition for rehearing (*id.* at 9a-10a) is not published. The opinion of the district court (*id.* at 11a-35a) is published at 831 F. Supp. 1154.

JURISDICTION

The order of the court of appeals denying a petition for rehearing was entered on September 22, 1995. The time for filing a petition for a writ of certiorari was first extended from December 21, 1995 to January 11, 1996, and then to January 25, 1996, by Orders of Circuit Justice Rehnquist. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are 28 U.S.C. 1331; 28 U.S.C. 1346(a)(2); and 29 U.S.C. 216(b). They are set forth in Pet. App., *infra*, at 50a-51a.

STATEMENT

1. The petitioners in this action are some 800 Customs Inspectors and Import Specialists who brought suit in the United States District Court for the Eastern District of Pennsylvania under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* ("FLSA").[1] Petitioners sought reclassification of their positions from "exempt" to non-exempt status. They also sought to recover overtime pay improperly withheld from them by their employer, the U.S. Customs Service ("Customs"). The petitioners alleged jurisdiction in the district court on the basis of section 16(b) of the FLSA, 29 U.S.C. 216(b), and 28 U.S.C. 1331.

Shortly after suit was filed, the government defendants moved to dismiss the case or in the alternative to transfer it to the Court of Federal Claims. Among other things, the government alleged that the district court lacked jurisdiction because the plaintiffs did not waive their rights to recover in excess of $10,000, as is required for the dis-

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[1] A list of the employees who filed consents to opt-in to the lawsuit as plaintiffs is contained in Pet. App. 39a-49a, *infra*.

trict court, rather than the Court of Federal Claims, to assert jurisdiction under the Tucker Act, 28 U.S.C. § 1346 (a)(2). The government also argued that venue was not properly laid in the Eastern District of Pennsylvania under the Tucker Act's venue provision, 28 U.S.C. 1402(a), as to those plaintiffs who did not reside in that judicial district.

2. The district court granted the government's motion and transferred the case to the Court of Federal Claims. It held that the Tucker Act (28 U.S.C. § 1346(a)(2)) is the exclusive basis for district court jurisdiction over FLSA claims against the United States. Pet. App. 17a-25a. It also agreed with the government's contention that venue over an FLSA case brought by plaintiffs from more than one judicial district could only lie in the Court of Federal Claims. *Id.* at 26a-29a. The court concluded, therefore, that any amendment of the complaint to waive damages in excess of $10,000 would be futile. *Id.* at 27a.

3. After the district court denied a motion for reconsideration (Pet. App. 36a-38a), the petitioners noted an appeal of the court's order of transfer with the United States Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. 1292(d)(4)(A). They argued that, under *Bowen v. Massachusetts*, 487 U.S. 879, 910 n.48 (1988), the Tucker Act is not the exclusive basis for district court jurisdiction over monetary claims against the government where an independent statutory basis for district court jurisdiction can be asserted. Relying on *Bowen* and precedent in other circuit courts construing identical statutory language, petitioners contended that the federal question statute, 28 U.S.C. § 1331, and section 16(b) of the FLSA—which allows suits against the United States "in any court of competent jurisdiction"—provided such an independent statutory basis for district court jurisdiction in this case.

The Federal Circuit affirmed the district court and rejected petitioners' arguments on the basis of its earlier

decision in *Zumerling v. Devine*, 769 F.2d 745 (Fed. Cir. 1985). *Zumerling* had held that section 16(b) of the Fair Labor Standards Act does not confer jurisdiction on the district courts to hear FLSA claims brought against the United States. As the court below noted, in *Zumerling*, it had concluded "that the FLSA conferred the right to recover money from the United States, that is, the FLSA contained the requisite waiver of sovereign immunity; but that only the Tucker Act provided jurisdiction of suits to enforce that right." Pet. App. 5a.

Zumerling, a pre-*Bowen* decision, did not, however, consider whether 28 U.S.C. 1331 (in conjunction with the FLSA's waiver of sovereign immunity) conferred jurisdiction on the district court. The court of appeals, nonetheless, rejected the contention that *Bowen* warranted that it reach a different result than that reached in *Zumerling*. It noted that *Bowen* was distinguishable because the plaintiff there was seeking relief other than money damages. Pet. App. 6a. The Federal Circuit acknowledged that other circuits had held that the term "court of competent jurisdiction" would "assign jurisdiction outside the Tucker Act for money claims against the United States." Pet. App. 6a-7a, citing *C.H. Sanders Co. v. BHAP Housing Development Fund Co., Inc.*, 903 F.2d 114 (2d Cir. 1990) and *Hubbard v. Environmental Protection Agency*, 982 F.2d 531 (D.C. Cir. 1992) (*en banc*). Notwithstanding this "divergence of judicial opinion against the government . . ." (Pet. App. 7a), the Court concluded that under *Zumerling*, which is the law of the Federal Circuit, the Tucker Act provides the exclusive basis for district court jurisdiction over FLSA claims against the United States.

The court, accordingly, affirmed the district court's order of transfer. It subsequently denied petitioners' request for rehearing. Pet. App. 9a-10a.

REASONS FOR GRANTING THE PETITION

This case raises an important issue of federal court jurisdiction upon which the circuit courts are in conflict. The Federal Circuit's ruling that the Tucker Act provides the exclusive jurisdictional basis for FLSA claims against the federal government is inconsistent with *Bowen v. Massachusetts*. Further, the decision conflicts directly with the Second Circuit's decision in *Ward v. Brown*, 22 F.3d 516 (2d Cir. 1994), finding district court jurisdiction pursuant to 28 U.S.C. 1331 over federal employees' statutorily-based claims for backpay. The Federal Circuit's decision also conflicts with the decisions of the Fourth, Eighth, and D.C. Circuits, interpreting statutory language that is virtually identical to that contained in the FLSA. This Court's review is warranted to resolve the conflict. Resolution of the question presented has important implications for federal court jurisdiction and for enforcement of the FLSA in the federal sector.

1. The Tucker Act establishes the jurisdiction of the Court of Federal Claims to hear claims against the United States that are based upon the Constitution, upon a statute, upon an executive regulation, or upon a contract. 28 U.S.C. 1491. The "Little Tucker Act," 28 U.S.C. 1346(a)(2), gives the district courts concurrent jurisdiction over such claims, when they do not exceed $10,000. The Tucker Act serves as a catch-all provision that waives the sovereign immunity of the United States for these claims. *United States v. Mitchell*, 463 U.S. 206, 216 (1983).[2]

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[2] Because the Tucker Act is a catch-all provision, to bring suit, an individual with a claim for money damages against the United States must also be able to identify a source of substantive law that " 'can fairly be interpreted as mandating compensation by the federal government for the damage sustained'." *United States v. Testan*, 424 U.S. 392, 400 (1976), *quoting Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967).

In *Bowen v. Massachusetts*, this Court clarified that, although it was "often assumed that the Claims Court has exclusive jurisdiction of Tucker Act claims for more than $10,000 . . . [t]hat assumption is not based on any language in the Tucker Act granting such exclusive jurisdiction to the Claims Court." Tucker Act jurisdiction, the Court explained, is exclusive "only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court." 487 U.S. at 910, n.48.[3]

Employees with FLSA claims against the federal government need *not* rely upon the general grant of jurisdiction in the Tucker Act to supply the federal government's consent to be sued. Section 16(b) of the FLSA provides that "any employer who violates [the minimum wage and overtime provisions of the FLSA] shall be liable to the employee or the employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and an additional amount as liquidated damages" and authorizes employees to bring suit against "any employer (including a public agency) in any Federal or State court of competent jurisdiction." 28 U.S.C. 216(b).

Section 1331 of Title 28, in turn, establishes that federal district courts are courts of "competent jurisdiction" to hear FLSA claims, by giving them original jurisdiction over claims that arise under the laws of the United States. The catch-all Tucker Act, therefore, is not a

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[3] Thus, *Bowen* rejects the reasoning of decisions like *Graham v. Henegar*, 640 F.2d 732 (5th Cir. 1981), which the *Zumerling* court cited. *See* 769 F.2d at 748. Ruling that FLSA claims against the federal government must be heard by the Claims Court where they exceed $10,000, *Graham* opined that the Tucker Act is the exclusive basis for jurisdiction over all non-tort claims against the United States that exceed $10,000, "even though the claim would otherwise fall within the coverage of some other statute conferring jurisdiction on the district court." 640 F.2d at 734.

necessary basis for the exercise of jurisdiction by the district court.[4]

2. The Federal Circuit's decision is in square conflict with *Ward v. Brown*, 22 F.3d 516 (2d Cir. 1994). That case, like this one, involved a claim for backpay brought against the United States as an employer on the basis of the violation of a federal statute.

In *Ward*, the Second Circuit held that the district court had jurisdiction over a claim for backpay exceeding $10,000 brought by a plaintiff challenging his discharge on constitutional and statutory grounds. The court of appeals reasoned that the plaintiff had raised a federal question, invoking 28 U.S.C. 1331, and that the Back Pay Act, 5 U.S.C. 5596, provided an independent waiver of the immunity of the United States, obviating the need to rely upon the Tucker Act's waiver.

In so ruling, the Second Circuit explicitly rejected the Federal Circuit's decision in *Mitchell v. United States*, 930 F.2d 893 (Fed. Cir. 1991), which had held (like *Zumerling*) that the Tucker Act serves as the exclusive basis for backpay claims brought by federal employees against the United States. *See* 22 F.3d at 520, citing *Mitchell*. As the *Ward* court explained, "regardless of the amount in controversy, an action in the district court is proper under the federal question statute, 28 U.S.C. 1331,

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[4] The Federal Circuit missed the point when it observed (Pet. App. 6a) that *Bowen* is "easy to distinguish" because the plaintiff there sought specific relief, as opposed to money damages. *Bowen* discussed the distinction between money damages and specific relief at some length because the Administrative Procedure Act, which was relied upon by the plaintiff Massachusetts, waived the federal fovernment's sovereign immunity only for the latter, and not for money damages. The court of appeals failed to appreciate *Bowen*'s conclusion that *even if* a plaintiff could obtain money damages under the Tucker Act, he could still have recourse to federal district court where Congress provides an independent basis for such jurisdiction.

if a statute other than the Tucker Act provides the necessary waiver of sovereign immunity." *Id.* at 519. "Thus," the court observed, "although an action could have been brought in the Court of Federal Claims under the Tucker Act, a district court has jurisdiction over the case so long as there is both a grant of subject matter jurisdiction and an independent waiver of sovereign immunity." *Id.*

3. As the Federal Circuit itself recognized (Pet. App. 7a), its ruling also conflicts with a number of decisions (both before and after *Bowen*) that have found an independent basis for district court jurisdiction in 28 U.S.C. 1331 where a statute allows suit against the federal government "in any court of competent jurisdiction."

a. For example, in a pre-*Bowen* decision—*Trans-Bay Engineers & Builders, Inc. v. Hills*, 551 F.2d 370 (D.C. Cir. 1976)—the D.C. Circuit held that section 1702 of the National Housing Act (12 U.S.C. 1702), which authorizes the Secretary of Housing and Urban Development to "sue or be sued in any court of competent jurisdiction, State or Federal," established a waiver of the federal government's sovereign immunity. In light of that independent waiver, the court ruled that the district court could exercise jurisdiction over claims that would otherwise be based on the Tucker Act, by virtue of either its diversity jurisdiction (28 U.S.C. 1332) or federal question jurisdiction (28 U.S.C. 1331). 551 F.2d at 376-77. The Eighth Circuit later came to the same conclusion. *See Bor-Son Building Corporation v. Heller*, 572 F.2d 174, 181-82 (8th Cir. 1978) (relying upon 28 U.S.C. 1442(a)(1) as the basis of district court jurisdiction).[5]

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[5] *See also Ferguson v. Union National Bank of Clarksburg*, 126 F.2d 753 (4th Cir. 1942) (relying upon section 1331); *Ghent v. Lynn*, 302 F. Supp. 879 (D. Conn. 1975) (National Housing Act waives sovereign immunity by permitting suit against Secretary in

On the other hand, the Ninth Circuit, like the Federal Circuit here, had held Tucker Act jurisdiction exclusive even where a statute makes the government subject to suit in a "court of competent jurisdiction," if the statute does not specify jurisdiction in the district court. *See Munoz v. Small Business Administration,* 644 F.2d 1361, 1365 n.3 (9th Cir. 1981), citing *Marcus Garvey Square, Inc. v. Winston Burnett Construction Co.,* 595 F.2d 1126 (9th Cir. 1979); *Pacificorp v. Federal Energy Regulatory Commission,* 795 F.2d 816, 825-827 (9th Cir. 1986) (Wallace, J. concurring). Thus, even before this Court's ruling in *Bowen,* "the circuits appear[ed] to be split on the question of whether the Tucker Act will limit section 1331 jurisdiction where another statute has been construed as a waiver of sovereign immunity." *Spectrum Leasing Corporation v. United States,* 764 F.2d 891, 895 n.8 (D.C. Cir. 1985).

b. Since *Bowen,* the Second and Eleventh Circuits, and now the Federal Circuit, have weighed in, deepening the conflict. In *C.H. Sanders Co. v. BHAP Housing Development Fund Co., Inc.,* 903 F.2d 114 (2d Cir. 1990), the Second Circuit, relying upon *Bowen,* held that the sue and be sued clause of section 1702 of the Housing Act constituted a waiver of the federal government's sovereign immunity and that the federal question statute conferred jurisdiction on the district court. *C.H. Sanders,* a decision later found controlling as to federal employee backpay claims in *Ward* (22 F.3d at 519), specifically rejected the government's argument that the Tucker Act displaces an otherwise valid exercise of federal question jurisdiction in the district court. *Id.* at 119-120. The

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"any court of competent jurisdiction;" 28 U.S.C. 1331 establishes jurisdiction in district court); *cf. Portsmouth Redevelopment and Housing Authority v. Pierce,* 706 F.2d 471, 475 (4th Cir.), *cert. denied,* 464 U.S. 392 (1983) ("sue and be sued" statute does not give district courts jurisdiction because it does not contain language "in any court of competent jurisdiction, State or Federal").

court held that section 1331 jurisdiction may be asserted over a claim in district court, "provided there is an independent waiver of sovereign immunity outside the Tucker Act." *Id.* at 119.

The decision of the Federal Circuit below (and the Eleventh Circuit in *Parker v. King*[6]) holds that the Tucker Act is exclusive because the FLSA itself does not vest jurisdiction in the district court. Those decisions conflict directly with *C.H. Sanders* and with the pre-*Bowen* decisions cited above, such as *Trans-Bay*.

Thus, the FLSA contains the same operative language as section 1702 of the Housing Act (addressed in those cases)—permitting the United States to be sued "in any court of competent jurisdiction, State or Federal." 29 U.S.C. 216(b). As even the Federal Circuit recognized below (Pet. App. 5a), this FLSA language waives the government's immunity to suit. Under the decisions of the Second and D.C. Circuits, that waiver of sovereign immunity, in conjunction with the federal question statute, provided an independent basis for the exercise of jurisdiction by the district court.

4. As shown, the Federal Circuit's ruling below is in direct conflict with the Second Circuit's decision in *Ward v. Brown*, which found district court jurisdiction over federal employees' backpay claims under the federal question statute where, as here, another statute waives the government's immunity from suit. The Federal Circuit's ruling also conflicts with the decisions of several circuit courts holding Tucker Act jurisdiction not exclusive where a federal question is presented and the action is brought pursuant to a statute, like the FLSA, that subjects the United States to suit "in any court of competent jurisdiction."

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[6] 935 F.2d 1174 (11th Cir. 1991), *cert. denied*, 505 U.S. 1229 (1992).

This Court's review is needed to resolve the conflict. As Justice Scalia has observed, "[n]othing is more wasteful than litigation about where to litigate." *Bowen v. Massachusetts*, 487 U.S. at 930 (dissenting opinion). That waste of the parties' time and of judicial resources will continue, unless this Court provides guidance.

Further, the jurisdictional question upon which the circuit courts are in conflict is an important one. The exclusivity of the Tucker Act affects whether the district courts can assert jurisdiction in cases where claims against the United States exceed $10,000. It also determines, as in this case, the appropriate venue provision to apply in district court and the proper appellate tribunal.

a. As a consequence of the Court's ruling that the Tucker Act is the exclusive basis for federal court jurisdiction over the FLSA claims of federal employees, plaintiffs in FLSA cases will, more often than not, find themselves forced to litigate their claims in Washington, D.C. in the Court of Federal Claims. The general venue provision—28 U.S.C. 1391(e)(4)—permits plaintiffs residing in different districts to participate in a single action against the federal government in any district in which at least one of the plaintiffs resides. *E.g., Exxon Corp. v. Federal Trade Commission*, 588 F.2d 895, 898-99 (3d Cir. 1978). It has been held, however, that (as the district court found in this case—Pet. App. 26a-29a) the Tucker Act's venue provision (28 U.S.C. 1402(a)(1)) requires *all* plaintiffs to reside in the district where Tucker Act venue is laid.[7]

FLSA suits against the federal government virtually always include plaintiffs residing in more than one judicial district. Under the FLSA, plaintiffs can join together in suit against their employer by filing consents and opting-in to the lawsuit. If the Tucker Act is the exclusive basis for jurisdiction and its venue provision applies,

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[7] *Brooks v. Weinberger*, 637 F. Supp. 22, 24 (D.D.C. 1986); *Davila v. Weinberger*, 600 F. Supp. 599, 601 (D.D.C. 1985).

then employees cannot join together in a single suit unless they come to Washington, D.C., where the Court of Federal Claims is located.

That result will undermine employees' ability to vindicate their FLSA rights collectively by denying them the most convenient forum. Further, by discouraging employees from joining together to file suit, it would defeat Congress' intent to consolidate like FLSA claims against a single defendant, and instead promote redundant claims in multiple forums.

b. Finally, the purposes of the FLSA are ill-served by centralizing the appeals process. In granting the court of appeals for the Federal Circuit exclusive jurisdiction over patent and other specialized subject matter cases, as well as cases that arise in whole or in part under the Tucker Act, Congress' motivating concern was to promote uniformity in certain areas of the law. *United States v. Hohri*, 482 U.S. 64, 71-72 (1987). Its aim was to create an appellate tribunal that could supply, in these areas, "reasonably quick and definitive answers to legal questions of nationwide significance." S. Rep. No. 275, 97th Cong., 2d Sess. (1982) at 3.

These rationales do not apply to FLSA cases. In extending the FLSA to the federal sector, Congress intended, not to create a specialized body of law, but to insure that the FLSA be interpreted in a manner consistent with its application in the private sector. *See American Federation of Government Employees v. Office of Personnel Management*, 821 F.2d 761, 769-71 (D.C. Cir. 1987). Resolution of FLSA cases in the federal sector, like the resolution of claims under Title VII of the Civil Rights Act or other similar remedial legislation, requires application of the same principles that the regional circuits apply to private sector cases; the Federal Circuit can develop no particular ability to provide definitive answers to FLSA questions, as it can with patent issues or federal contract questions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

94-1073

FRANK SARACO and
800 similarly situated individuals,
Plaintiffs-Appellants,

v.

THE UNITED STATES and CAROL BOYD HALLETT
in her capacity as
COMMISSIONER, UNITED STATES CUSTOMS SERVICE,
Defendants-Appellees.

DECIDED: July 28, 1995

Before ARCHER, *Chief Judge,* NEWMAN and MICHEL,
Circuit Judges.

NEWMAN, *Circuit Judge.*

Frank Saraco and 800 similarly situated individuals appeal the decision of the United States District Court for the Eastern District of Pennsylvania, transferring this case to the United States Court of Federal Claims.[1] This appeal is taken in accordance with 28 U.S.C. § 1292 (d)(4)(A), which assigns to the Federal Circuit exclusive

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[1] *Saraco v. Hallett*, No. 91-5629 (E.D. Pa. Aug. 3, 1993).

jurisdiction of interlocutory appeals of the issue of jurisdiction as between the district court and the Court of Federal Claims.

BACKGROUND

Appellants are Customs Inspectors and Import Specialists who are classified as employed in an "administrative capacity" within the meaning of 29 U.S.C. § 213 (a)(1) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq. They are considered "exempt" employees for the purposes of the FLSA. The gravamen of their suit is that they are improperly classified as exempt, and that this classification impairs their right to compensation for overtime work. In Count I they challenge their classification under the applicable regulations of the Office of Personnel Management, and seek back pay and liquidated damages as provided by the FLSA. In Count II they challenge the validity of OPM's classification regulations in administration of the FLSA.

The district court, on motion of the government, transferred Count I to the Court of Federal Claims. Rejecting the appellants' position that the appropriate jurisdictional statute is § 216(b) of the FLSA, the district court held that only the Tucker Act grants jurisdiction of such suits against the United States. Tucker Act suits for amounts in excess of $10,000 can be brought only in the Court of Federal Claims:

> 28 U.S.C. § 1491(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

"Little" Tucker Act suits, for claims not exceeding $10,000, can be brought in the district courts:

> 28 U.S.C. § 1346(a)(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, . . . [except for claims subject to] the Contract Disputes Act of 1978.

28 U.S.C. § 1402(a)(1) provides that claims brought under section 1346(a), other than by a corporation, may be prosecuted only in the judicial district where the plaintiff resides.

The district court denied the appellants' motion to amend their complaint to limit to $10,000 the damages sought by each plaintiff, an opportunity that is usually granted to Tucker Act plaintiffs who wish to remain in the district court. The district court ruled that venue was improper as to those plaintiffs (a majority of the total) who reside outside of the Eastern District of Pennsylvania. The court explained that amendment of the complaint would be futile in light of the venue problem.

The district court also transferred Count II of the complaint. The court observed that although the Court of Federal Claims does not have original jurisdiction over the classification action, which was brought pursuant to the Administrative Procedure Act, that court does have power to afford complete relief:

> 28 U.S.C. § 1491(a)(2). To provide an entire remedy and to complete the relief afforded by the judgment, the [Court of Federal Claims] may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, . . . and such orders may be issued to any appropriate official of the United States.

Neither side challenges the correctness of the transfer of Count II, if Count I were properly transferred.

DISCUSSION

A waiver of governmental immunity "cannot be implied but must be unequivocally expressed." *United States v. King*, 395 U.S. 1, 4 (1969). When so expressed, however, it must be applied in accordance with its terms, and not reinterpreted contrary to congressional intent. *See, e.g., Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955) ("Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it.")

Appellants argue that the district court was incorrect in holding that the Tucker Act is the only statute conferring jurisdiction with respect to Count I. They argue that the intent of the Fair Labor Standards Act is clear, and that it confers jurisdiction on the district court without distinguishing between government and private employers, in that the FLSA authorizes suit "against any employer (including a public agency) in any Federal or State court of competent jurisdiction":

> 29 U.S.C. § 216(b) Damages; right of action; . . .
>
> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . . An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

Appellants argue that this provision authorizes suit in the district court because that court's federal question jurisdiction makes it a court "of competent jurisdiction" for actions under the FLSA, and that § 216(b) does not distinguish between private and public employers. The government's response is that only the Tucker Act confers jurisdiction for monetary claims against the government arising under the FLSA.

A

The question of jurisdiction is a recurring one in suits against the government. In *Zumerling v. Devine*, 769 F.2d 745 (Fed. Cir. 1985), federal firefighters challenged, in the district court, the government's method of calculating their overtime pay under the FLSA. The question was raised of whether the district court's jurisdiction was based on the Tucker Act or the FLSA, since that would determine whether claims in excess of $10,000 could be presented in the district court, as well as the path of appeal.

The Federal Circuit discussed the difference "between a law conferring a substantive right to recover money from the United States, and a law endowing a court with jurisdiction of suits to enforce that right," and held that these were distinct requirements, both of which must be satisfied. *Zumerling*, 769 F.2d at 749 (citing *United States v. Testan*, 424 U.S. 392 (1976)). *See also United States v. Mitchell*, 463 U.S. 206, 216 (1983). The court explained that the FLSA conferred the right to recover money from the United States, that is, the FLSA contained the requisite waiver of sovereign immunity; but that only the Tucker Act provided jurisdiction of suits to enforce that right. Thus the court concluded that the Tucker Act was the applicable jurisdictional statute in the district court. *Zumerling*, 769 F.2d at 749.

Appellants invite us to reconsider *Zumerling*, suggesting that it was not correctly decided. Appellants suggest

that the correct reading of the FLSA is that it both waived sovereign immunity and provided an independent basis for the district court's jurisdiction, separate from the Tucker Act. Appellants point to the Supreme Court's reminder that:

> [W]aiver of sovereign immunity is accomplished not by "a ritualistic formula"; rather intent to waive immunity and the scope of such a waiver can only be ascertained by reference to underlying congressional policy.

Franchise Tax Board v. United States Postal Service, 467 U.S. 512, 521 (1984) (quoting *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 389 (1939)). However, the issue in this case is not whether governmental immunity from suit has been waived, for it explicitly has been. The issue is only in which federal court the authorized suit may be brought.

Appellants suggest that a change in viewpoint is reflected in the analysis of congressional intent in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), wherein the Court recognized that the district court may have jurisdiction of some monetary claims outside of the Tucker Act; and in *American National Red Cross v. S.G.*, 505 U.S. 247 (1992), wherein the Court held that the federal charter of the Red Cross, which authorized that organization "to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States," conferred original jurisdiction on the federal district courts.

Although it is easy to distinguish the cause in *Bowen v. Massachusetts*, where the plaintiff was seeking relief other than money damages, from a claim under the Tucker Act; and it is readily seen that a suit against the Red Cross is not a suit against the United States; we take note that there are other instances in which the term "court of competent jurisdiction" has been interpreted to assign jurisdiction outside of the Tucker Act for monetary claims against the government. For example, in

C.H. Sanders Co. v. BHAP Housing Development Fund Co., 903 F.2d 114 (2d Cir. 1990), that court held that for actions under the National Housing Act, 12 U.S.C. § 1702, the district court had jurisdiction under 28 U.S.C. § 1331, and rejected the government's argument that the Tucker Act overrides federal question jurisdiction in the district court. In *Hubbard v. Administrator, E.P.A.*, 982 F.2d 531 (D.C. Cir. 1992) (*en banc*), that court held that a claim for pay by a person who was wrongfully denied employment was a claim for money damages and suit must be brought under the Tucker Act, adding that "We do not suggest that back pay must always be viewed as money damages and can never be properly categorized as specific relief." 982 F.2d at 533 n.4.

Divergence of judicial opinion concerning the jurisdiction of monetary claims against the government under various statutes is reflected in the many cases raising the threshold question of jurisdiction as between the district courts and the Court of Federal Claims. However, the Federal Circuit in *Zumerling v. Devine* held that jurisdiction of cases under the FLSA was provided only by the Tucker Act. *Zumerling* states the consistent law of the Federal Circuit. We have come upon no instances of circuit conflict in FLSA actions against the United States. *Zumerling* is in accord with *Testan* and *Mitchell, supra*, and is not inconsistent with *Bowen v. Massachusetts* or *American Red Cross*. It is binding precedent in this court. The district court correctly applied this precedent in transferring the case to the Court of Federal Claims.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

94-1073

FRANK SARACO and
800 similarly situated individuals,
Plaintiffs-Appellants,

v.

THE UNITED STATES and CAROL BOYD HALLETT
in her capacity as
COMMISSIONER, UNITED STATES CUSTOMS SERVICE,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
in Case No(s) 91-5629

JUDGMENT

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED

Dated Jul. 28, 1995

ENTERED BY ORDER OF THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

ISSUED AS A MANDATE: September 29, 1995

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

94-1073

FRANK SARACO and
800 similarly situated individuals,
Plaintiffs-Appellants,

v.

THE UNITED STATES and CAROL BOYD HALLETT
in her capacity as
COMMISSIONER, UNITED STATES CUSTOMS SERVICES,
Defendants-Appellees.

ORDER

Before ARCHER, Chief Judge, NEWMAN, Circuit Judge, and MICHEL, Circuit Judge.

A petition for rehearing having been filed by the APPELLANT, a response thereto having been invited by the court and filed by the APPELLEE, and APPELLANT'S REPLY TO THE RESPONSE having also been filed by leave of the court,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on September 29, 1995.

Dated: September 22, 1995

FOR THE COURT,
FRANCIS X. GINDHART
Clerk

by /s/ Diane M. Frye
DIANE M. FRYE
Chief Deputy Clerk

APPENDIX D

[Filed Aug. 4, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 91-5629

FRANK SARACO, HOWARD MARDER,
GARY LEVENSON, CHARLES DUBANO,
RICHARD BOLES, and STEVEN FOREMAN, *et al.*,
Plaintiffs

v.

CAROL BOYD HALLETT, *et al.*,
Defendants

MEMORANDUM

DUBOIS, J. August 3, 1993

Presently before the Court is Defendants' Motion to Dismiss Plaintiffs' Third Amended Complaint and Defendants' Motion to Transfer Count I of Plaintiffs' Third Amended Complaint to the United States Court of Federal Claims (hereinafter "Court of Federal Claims") In the Alternative to Dismissal. For the reasons which follow, Defendants' Motion to Dismiss Plaintiffs' Third Amended Complaint will be denied and Defendants' Motion to Transfer Count I to the Court of Federal Claims will be granted. The Court will also transfer Count II of Plaintiffs' Third Amended Complaint to the Court of Federal Claims.

I. BACKGROUND

This action was commenced by the six named plaintiffs, employees of the United States Customs Service ("Customs Service"), on their own behalf, and on behalf of more than 700 similarly situated employees of the Customs Service who have filed consent forms to partici-

pate in this action as "opt-in" plaintiffs, alleging that the Customs Service violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, in the calculation of their overtime pay. The defendants are Carol Boyd Hallett, Commissioner of the United States Customs Service, Constance Berry Newman, Director of the Office of Personnel Management ("OPM"), and the United States of America, plaintiffs' employer.[1]

Plaintiffs are federal employees who are covered by the FLSA. *See* 29 U.S.C. § 203(e)(2)(A). In general, under the FLSA, employees are entitled to overtime pay at one and a half times their regular hourly rate of pay for hours worked in excess of 40 hours per week. 29 U.S.C. § 207(a)(1). However, "any employee employed in a bona fide . . . administrative . . . capacity" is exempt from the overtime pay provision of section 207. *See* 29 U.S.C. 213(a)(1). Employees who are exempt from the FLSA's overtime provision receive overtime pay at a "capped" rate—one and a half times the rate of a level GS-10, step one employee—pursuant to the Federal Employment Pay Act ("FEPA"). *See* 5 U.S.C. § 5542 (a)(2). Plaintiffs assert that their regular hourly rate is higher than that of a level GS-10, step one employee. (Third Am. Compl. ¶ 15)

Plaintiffs were categorized as administrative employees within the meaning of section 213(a)(1) of the FLSA by the Customs Service pursuant to an OPM regulation which defines the term "administrative employee" and sets forth a primary duty test for determining whether an employee meets the administrative exemption. *See* 5 C.F.R. § 551.205.[2] Having been classified as administra-

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[1] Defendants Hallett and Newman are being sued only in their official capacities. (Third Am. Compl. ¶¶ 10, 11)

[2] The OPM regulation states in relevant part:

> An administrative employee is an advisor, assistant, or representative of management, or a specialist in a management or

tive employees, plaintiffs received overtime pay at the capped rate pursuant to FEPA, rather than at their regular hourly rate.

In Count I of their Third Amended Complaint, plaintiffs claim that the Customs Service improperly classified them as administrative employees under the OPM regulation and failed to pay them the proper rate of pay for overtime hours in violation of section 216(b) of the FLSA.[3] They contend that they do not meet the primary

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general business function or supporting service who meets all of the following criteria:

(a) The employees's primary duty consists of work that

(1) Significantly affects the formulation or execution of management policies or programs; or

(2) Involves general management or business functions or supporting services of substantial importance to the organization serviced; or

(3) Involves substantial participation in the executive or administrative functions of a management official.

(b) The employee performs office or other predominantly nonmanual work which is—

(1) Intellectual and varied in nature; or

(2) Of a specialized or technical nature that requires considerable special training, experience, and knowledge.

(c) The employee must frequently exercise discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

5 C.F.R. § 551.205. Only the primary duty test set forth in subsection (a) is at issue in this case.

[3] Section 216(b) of the FLSA states in relevant part:

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their . . . unpaid overtime compensation . . . and in an additional equal amount as liquidated damages. . . . An action to recover the liability . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No em-

duty test set forth in the OPM regulation and, therefore, are entitled to overtime pay at one and half times their regular hourly rate, not at the capped rate under FEPA, and liquidated damages equal to the amount of any overtime pay awarded.[4]

In Count II, plaintiffs ask the Court to declare that the OPM regulation which defines administrative employees is invalid. The focus of Count II is on the primary duty test set forth in the OPM regulation upon which the Customs Service relied in determining that plaintiffs are administrative employees. OPM is authorized to administer the FLSA with respect to individuals employed by the federal government. *See* 29 U.S.C. § 204(f). The Department of Labor ("DOL") administers the FLSA with respect to individuals employed in the private and non-federal public sectors. *See generally American Federation of Government Employees v. Office of Personnel Management*, 821 F.2d 761, 770 (D.C. Cir. 1987).

It is plaintiffs' position that OPM must exercise its rulemaking authority in a manner consistent with the Secretary of Labor's implementation of the FLSA, *see*

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ployee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. § 216(b).

[4] Section 216(b) of the FLSA, which entitles an employee to recover liquidated damages, is modified by section 260 of that act. Section 260, which gives courts discretion in determining the amount of liquidated damages to award, if any, states in relevant part:

> In any action . . . to recover . . . unpaid overtime compensation . . . under the [FLSA] . . . if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act . . . the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216.

American Federation of Government Employees, 821 F.2d at 770, and that, in violation of that requirement, the OPM regulation defining administrative employees is more broad than the comparable DOL regulations. *See* 29 C.F.R. § 541.2(a) and 541.205.[5] Continuing, plaintiffs contend they would not meet the primary duty test under DOL regulations, whereas the Customs Service has classified them as administrative employees under the OPM regulations. Accordingly, plaintiffs argue that, because they were classified as administrative employees under the more broad OPM regulation, whereas they would not have been so classified under the DOL regulations, the OPM regulation should be declared invalid.

Defendants move to dismiss plaintiffs' Third Amended Complaint on several grounds. First, defendants assert that the Court lacks jurisdiction to entertain plaintiffs' overtime claims which, when they arose, were subject to the negotiated grievance procedures set forth in the collective bargaining agreement between the Customs Service and Customs Service employees. Second, defendants assert that any overitme claims which are not subject to negotiated grievance procedures are within the exclusive jurisdiction of the Court of Federal Claims pursuant to the Tucker Act because they exceed $10,000.[6] Third, defendants assert that, with respect to claims which

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[5] 29 C.F.R. § 541.2 states in relevant part:

> The term 'employee employed in a bona fide . . . administrative . . . capacity' in section 13(a)(1) of the [FLSA] shall mean any employee:
>
> (a) Whose primary duty consists of either:
>
> (1) The performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers . . .
>
> (b) Who customarily and regularly exercises discretion and independent judgment . . . .

29 C.F.R. § 541.205 sets forth an expansive definition of the phrase "directly related to management policies" in section 541.2.

[6] See infra discussion of Defendants' Motion to Transfer Count I.

do not exceed $10,000, venue under the Tucker Act does not lie in this district because most of the opt-in plaintiffs do not reside in this district.[7] It is defendants' position that venue in the district court for such claims lies only in the district in which all plaintiffs reside. Because all plaintiffs do not reside in a single district, defendants argue that the suit should have been brought in the Court of Federal Claims. Thus, defendants ask the court to dismiss the action for improper venue. Finally, defendants assert that plaintiffs lack standing to challenge the OPM overtime regulation, or, alternatively, plaintiffs' allegation that the OPM regulation is invalid fails to state a claim upon which relief can be granted.

Defendants' Motion to Transfer Count I of Plaintiffs' Third Amended Complaint to the Court of Federal Claims in the Alternative to Dismissal asserts that this Court lacks jurisdiction over plaintiffs overtime claims on the ground that the Court of Federal Claims has exclusive jurisdiction over non-tort claims against the United States for money damages in excess of $10,000. Therefore, defendants maintain, if not dismissed, Count I must be transferred to the Court of Federal Claims.

The Court need not address each of defendants' grounds for dismissal as the Court concludes that it lacks jurisdiction over plaintiffs claims for overtime pay and liquidated damages set forth in Count I, and will transfer Count I to the Court of Federal Claims pursuant to 28 U.S.C. 1631.[8] Jurisdiction over such claims is

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[7] As of the time of filing this action, all of the named plaintiffs resided in this judicial district. The opt-in plaintiffs, who filed consent forms to become parties plaintiff after the initial Complaint was filed, reside in numerous judicial districts.

[8] Section 1631 states in relevant part:

> Whenever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action . . . to any other such court in which the action . . . could have been

defined by the Tucker Act and, under that statute, where such claims exceed $10,000, they must be brought in the Court of Federal Claims.[9] Furthermore, under the venue provision applicable to Tucker Act claims which do not exceed $10,000, because many of the opt-in plaintiffs reside in other judicial districts, the action may only be brought in the Court of Federal Claims. *See* 28 U.S.C. §§ 1346 and 1402(a).

With respect to Count II, the Court concludes that plaintiffs have standing to challenge the OPM regulation at issue and have stated a claim upon which relief may be granted. The Court further concludes that the Court of Federal Claims is capable of affording plaintiffs complete relief. Accordingly, Count II will be transferred to that court.

III. DISCUSSION

A. *Jurisdiction Over Plaintiffs' Claims in Count I Lies In the Court of Federal Claims.*

Analysis of this Court's jurisdiction must begin with the Tucker Act which is codified at 28 U.S.C. §§ 1346 and 1491. The Tucker Act creates no substantive right of recovery; rather it waives sovereign immunity and defines the limits of federal jurisdiction in actions against the United States for non-tort money damages. *See United States v. Testan,* 424 U.S. 392, 400, 96 S. Ct.

> brought at the time it was filed or noticed, and the action . . . shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

28 U.S.C. § 1631.

[9] Because the Court concludes that it does not have jurisdiction over Count I pursuant to the Tucker Act, defendants' contention that the Court lacks jurisdiction over plaintiffs' overtime claims which, when they arose, were subject to negotiated grievance procedures set forth in the collective bargaining agreement need not be addressed.

948, 954 (1976); *Chabal v. Reagan*, 822 F.2d 349, 353 (3d Cir. 1987). Section 1346, referred to as the Little Tucker Act, states in relevant part:

> (a) The district courts shall have original jurisdiction, concurrent with the United States [Court of Federal Claims], of: . . . (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort . . . .

28 U.S.C. § 1346(a). Section 1491, referred to as the Big Tucker Act, states in relevant part:

> The United States [Court of Federal Claims] shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. 1491(a)(1).

Plaintiffs' FLSA claims in Count I are for non-tort money damages against the United States and, therefore, fall within the scope of the Tucker Act. *See Parker v. King*, 935 F.2d 1174, 1178 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 3055 (1992). To the extent plaintiffs' FLSA claims exceed $10,000, such claims are within the exclusive jurisdiction of the Court of Federal Claims and must be transferred to that court. *Parker*, 935 F.2d at 1178; *accord Zellous v. Broadhead Associates*, 906 F.2d 94, 96 n.3 (3d Cir. 1990). For any of plaintiffs claims that do not exceed $10,000, this Court has concurrent jurisdiction with the Court of Federal Claims under the Little Tucker Act.

Ordinarily, the Court would grant plaintiffs leave to amend their Third Amended Complaint in order to waive their right to recover in excess of $10,000 and bring their claims within the scope of the Little Tucker Act, and plaintiffs requested leave to so amend in their Opposition to Defendants' Motion to Dismiss Third Amended Complaint. However, for the reasons set forth in subsection C of this Memorandum, under the Little Tucker Act, venue is not properly laid in this district and, accordingly, leave to amend will not be granted.

B. *The Court Does Not Have an Alternative Basis for Jurisdiction Over Plaintiffs' Claims in Count I.*

In reliance upon the United States Supreme Court decision in *Bowen v. Massachusetts*, 487 U.S. 879, 108 S. Ct. 2722 (1988), plaintiffs contend that the Court of Federal Claims does not have exclusive jurisdiction over claims against the United States which exceed $10,000. Under this line of reasoning, plaintiffs contend section 216(b) of the FLSA waives the sovereign immunity of the United States and this Court has subject matter jurisdiction pursuant to the federal question jurisdiction statute—28 U.S.C. § 1331—and 28 U.S.C. § 1337.[10]

Plaintiffs also rely on *American National Red Cross v. S.G. and A.E.*, 112 S. Ct. 2465 (1992), for the proposition that section 216(b) of the FLSA, in addition to waiving the sovereign immunity of the United States, constitutes an independent grant of subject matter juris-

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[10] 28 U.S.C. § 1331 states:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1337 states in relevant part:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies . . . .

diction. The Court will address each of plaintiffs' alternative jurisdiction arguments.

1. *Bowen v. Massachusetts*

In *Bowen*, the Supreme Court stated:

> It is often assumed that the Claims Court has exclusive jurisdiction of Tucker Act claims for more than $10,000. That assumption is not based on any language in the Tucker Act granting such exclusive jurisdiction to the Claims Court. Rather, that Court's jurisdiction is "exclusive" only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court.

487 U.S. 879, 108 S. Ct. at 2740 n.48. Plaintiffs maintain that in light of the language in *Bowen*, employees with FLSA claims against the United States need not rely on the Tucker Act as the basis for district court jurisdiction. The Court disagrees with this analysis.

In *Bowen*, the State of Massachusetts brought suit in the Federal District Court for the District of Massachusetts challenging a decision by the Department of Health and Human Services ("HHS") disallowing reimbursement to the state for certain expenditures under the Medicaid program and seeking declaratory and injunctive relief. In its complaint, the state relied on section 702 of the Administrative Procedure Act ("APA") as a waiver of the sovereign immunity of the United States and invoked federal question jurisdiction pursuant to 28 U.S.C. § 1331. Section 702 permits a claimant to pursue an action to review agency action in federal court where the claimant seeks other than money damages. *See* 5 U.S.C. § 702 (1988). The district court reversed the agency's decision and the Court of Appeals for the First Circuit affirmed.

The Secretary of HHS argued in the Supreme Court that section 702 did not authorize review by the district

court because the relief sought by the state was in the form of money damages. The Supreme Court disagreed, holding that although the order of the district court reversing the agency's disallowance decision could require the payment of money by the federal goverment, such an award was for specific relief rather than for money damages and thus was within the jurisdiction of the district court under the waiver of sovereign immunity contained in section 702 of the APA. 108 S. Ct. at 2740. The Court distinguished between actions at law for money damages—"which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation"—and equitable actions for specific relief—which attempt to give the plaintiff the very thing to which he was entitled. 108 S. Ct. 2731-32.

Plaintiffs' reliance on *Bowen* is somewhat misplaced as *Bowen* is distinguishable from the case presently before the Court. First, because the *Bowen* Court concluded that the relief sought by plaintiffs was specific relief, not money damages, the Tucker Act was not implicated. Second, although plaintiffs' claims for overtime bear some of the indicia of specific relief, the Court need not decide whether such claims are for specific relief,[11] as plaintiffs claims for liquidated damages clearly fall outside of the definition of specific relief articulated by the Supreme Court in *Bowen*. Claims for liquidated damages under the FLSA have been characterized by the Third Circuit as compensatory damages; "they compen-

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[11] The Court notes, without deciding the issue, that some courts have considered FLSA claims for overtime to be synonymous with back pay claims. *See Brock v. Superior Care, Inc.*, 840 F.2d 1054 (2d Cir. 1988); *Doyle v. United States*, 20 Cl. Ct. 495 (1990), *aff'd*, 931 F.2d 1546 (1991), *cert. denied*, 112 S. Ct. 866 (1992); *Brock v. G & W Drive-In*, 1986 WL 15410 (W.D. Ark. 1986); *Cook v. United States*, 109 F.R.D. 81 (E.D.N.Y. 1985). Back pay has been characterized as money damages. *Hubbard v. Environmental Protection Agency*, 982 F.2d 531, 536 (D.C. Cir. 1992) (citation omitted).

sate employees for the losses they may have suffered by reason of not receiving their proper wages at the time they were due." *See Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1299 (3d Cir. 1991) (*citing Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 583-84, 62 S. Ct. 1216, 1223 (1942); *Martin v. Cooper Electric Supply Co.*, 940 F.2d 896, 907 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1473 (1992). So characterized, plaintiffs claims for liquidated damages—compensatory damages and, therefore, money damages as defined by the Supreme Court in *Bowen*—render *Bowen* inapplicable.

Jurisdiction over claims for *money damages* against the United States, such as plaintiffs claims for liquidated damages under the FLSA, is governed by the Tucker Act. Where such claims exceed $10,000, the Court of Federal Claims has exclusive jurisdiction. *Zellous*, 906 F.2d at 96 n.3. Where such claims are less than $10,000 the district court has concurrent jurisdiction with the Court of Federal Claims. *See* 28 U.S.C. 1346(a).

Finally, with respect to plaintiffs' contention that the FLSA is a waiver of sovereign immunity and that general jurisdiction statutes such as 28 U.S.C. §§ 1331 and 1337 establish that federal district courts are courts of "competent jurisdiction" within the meaning of the FLSA, the Court disagrees.[12]

Contrary to plaintiffs' position, the legislative history of the FLSA demonstrates that Congress did not intend the FLSA to waive the sovereign immunity of the United States. Section 216(b) of the FLSA, as originally enacted, was enforceable against employers generally, but did not cover federal employees or address waiver of sovereign immunity.[13] Section 203 was amended in 1974

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[12] *See supra* note 3 for the text of section 216(b) of the FLSA.

[13] Prior to the 1974 amendments, the relevant portion of section 216(b) read as follows: "Action to recover such liability may be

to expand the definition of employer to include a "public agency." *See* 1974 U.S.C.C.A.N. 2811. Section 216(b) was also amended in 1974 to extend coverage under the act to federal, state and local public employees. *Id.* As amended, the relevant portion of section 216(b) reads as follows: "An action to recover the liability . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction." The 1974 amendment to the FLSA did not address sovereign immunity.

The cases relied upon by plaintiffs in their Opposition to Defendants' Motion to Dismiss Third Amended Complaint are inapposite. *See C.H. Sanders Co. v. BHAP Housing Development Fund Co.*, 903 F.2d 114 (2d Cir. 1990); *Industrial Indemnity, Inc. v. Landrieu*, 615 F.2d 644 (5th Cir. 1980); *Bor-Son Building Corp. v. Heller*, 572 F.2d 174 (8th Cir. 1978); *Trans-Bay Engineers and Builders, Inc. v. Hills*, 551 F.2d 370 (D.C. Cir. 1976). In those cases, the statutes relied upon as the waiver of sovereign immunity were part of the National Housing Act which expressly permitted suit against the Secretary of Housing for certain claims, not a general statute such as the FLSA to which public agencies were later added.

Plaintiffs cite no direct authority for the proposition that the FLSA waives the sovereign immunity of the United States and the Court has found only one reported case that has reached such a conclusion. *See Huddleston v. Donovan*, 524 F. Supp. 179, 181 (N.D. Ill. 1981) (section 216(b) creates a waiver of sovereign immunity but does not itself confer jurisdiction, referring instead to courts of "competent jurisdiction"). The Court chooses not to follow the *Huddleston* court's conclusion with respect to the issue of sovereign immunity.

Given the fact that, with no reference to sovereign immunity, public agencies were added to the FLSA, a

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maintained in any court of competent jurisdiction . . . ." 29 U.S.C. § 216(b) (1965).

previously existing statute which did not address sovereign immunity, and the scant authority supporting plaintiffs' position, the Court cannot conclude that the intent of Congress, in enacting and amending the FLSA, was to waive sovereign immunity. Thus, the Court holds that the waiver of sovereign immunity applicable to plaintiffs' claims is found in the Tucker Act.

2. *American National Red Cross v. S.G.*

In *Red Cross,* the Supreme Court held that the "sue and be sued" provision of the American National Red Cross charter, which specifically mentioned federal courts, conferred original jurisdiction on federal courts over all cases in which the Red Cross is a party. *Id.* at 2472; 36 U.S.C. § 2.[14] The Court explained that federal court jurisdiction is provided by such a statute "if, but only if, it specifically mentions the federal courts." Plaintiffs contend that, by analogy to the sue and be sued language of the Red Cross charter, the FLSA is an independent grant of jurisdiction. The Court concludes that the holding of *Red Cross* is not capable of the broad proposition for which it is cited by plaintiffs.

First, the Court has already concluded that the FLSA does not waive sovereign immunity and, therefore, plaintiffs must rely on the Tucker Act for such waiver. The Tucker Act, in addition to defining the scope of the United States' consent to be sued for non-tort money damages, defines the limits of federal district court jurisdiction where the United States is the defendant.

Second, in reaching its conclusion that the Red Cross charter conferred original jurisdiction upon federal courts, the Supreme Court examined the history of the Congres-

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[14] The relevant portion of the Red Cross charter states: " 'The American National Red Cross' . . . shall have . . . the power to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States . . . ."

sional charter under which the Red Cross was created, and its prior decisions in which the jurisdictional consequences of other Congressional charters were analyzed. 112 S. Ct. at 2468-70. In contrast, the legislative history of the FLSA, and the case law interpreting that act, do not demonstrate an intent on the part of Congress to confer original jurisdiction over FLSA actions upon federal district courts.

Third, the FLSA—a statute which confers upon covered employees the substantive right to recover overtime pay and liquidated damages from an employer (including the United States)—is distinguishable from the Congressional charter under which the Red Cross was established as a "body corporate and politic" and vested with certain powers. *See* 36 U.S.C. §§ 1, 2. Section 216(b) includes additional qualifying language which is not present in the Red Cross charter—that suit may be maintained in federal or state courts *of competent jurisdiction. See e.g. Brown v. General Services Administration,* 425 U.S. 820, 833, 96 S. Ct. 1961, 1968 (1976) (as a general rule, specific jurisdictional statutes control over general statutes); *Parker,* 935 F.2d at 1178. The "competent jurisdiction" language illustrates that the FLSA itself does not confer jurisdiction, but rather relies upon other jurisdictional statutes to define which courts are competent to entertain FLSA claims. Where the employer/defendant is the United States government, competent jurisdiction is specifically defined by Tucker Act. *Huddleston,* 524 F.2d at 181; *see also Parker,* 935 F.2d at 1178. Thus, the Court concludes that the express provisions of the Tucker Act control over the general jurisdictional statutes relied upon by plaintiffs—28 U.S.C. §§ 1331 and 1337. *Brown,* 425 U.S. at 833, 96 S. Ct. at 1968.

C. Venue Does Not Lie in This District Under the Little Tucker Act.

In order to accord plaintiffs the option of remaining in the district court where their monetary claims against the United States exceed $10,000, courts have generally permitted plaintiffs to waive their right to recover in excess of $10,000 so as to bring their claims within the scope of the Little Tucker Act. *Chabal,* 822 F.2d at 357; *Hahn v. United States,* 757 F.2d 581, 587-88 (3d Cir. 1985). In this case, such an amendment would be futile.

The venue provision applicable to claims which are governed by the Little Tucker Act states in relevant part: "[a]ny civil action in a district court against the United States under subsection (a) of section 1346 of this title may be prosecuted *only:* . . . (2) in the judicial district *where the plaintiff resides* . . . ." 28 U.S.C. § 1402(a) (emphasis added). The weight of authority holds, and the Court agrees, that under the Little Tucker Act, venue must be satisfied for each plaintiff. *See Davila v. Weinberger,* 600 F. Supp. 599 (D.D.C. 1985); *see also Brooks v. Weinberger,* 637 F. Supp. 22, 24 (D.D.C. 1986) (venue in the district court under the Little Tucker Act was only proper with respect to individuals who reside in that district); *National Treasury Employees' Union v. Reagan,* 629 F. Supp. 762, 765 (D.D.C. 1985) (claims of non-residents dismissed under 28 U.S.C. § 1402(a) for improper venue), *aff'd,* 806 F.2d 1034 (Fed. Cir. 1986), *cert. denied,* 481 U.S. 1068 (1987).

In *Davila,* the District Court for the District of Columbia held that "the [Little] Tucker Act requires plaintiffs to litigate their claims only in the district in which they individually reside, or in the Claims Court." 600 F. Supp. at 604. The *Davila* court concluded that the history and purpose of the Little Tucker Act "embody Congress' deliberate efforts to channel certain types of cases to the [Court of Federal Claims] . . . while allowing other claims to be

heard concurrently by certain district courts." *Davila*, 600 F. Supp. at 604. The court further explained that the Little Tucker Act venue provision "was deliberately drafted to carve out a narrow exception to the jurisdiction of the Court of Claims"—to give persons with relatively small claims the option of bringing suit in the district where they and their witnesses reside.[15] *Id; see also* 1964 U.S.C.C.A.N. 3254 (in rare cases where claim for back pay exceeds $10,000, it would not be an undue hardship for claimant to bring suit in the Court of Federal Claims, *as provided in the present law*). Such provision was not intended to diminsh Court of Federal Claims jurisdiction over suits involving plaintiffs who reside in multiple judicial districts.

The propriety of venue in this district was properly raised by defendants in their Motion to Dismiss Plaintiffs' Third Amended Complaint. Accordingly, the Court will assess the venue issue on the basis of circumstances as they existed at the time such Motion to Dismiss was filed. *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1200 (8th Cir. 1990). As of that time, the six original plaintiffs, all residents of the Eastern District of Pennsylvania, had been joined by numerous opt-in plaintiffs who reside in multiple judicial districts.

Based on the foregoing discussion, the Court concludes that, because the opt-in plaintiffs reside in multiple judicial districts, the only forum in which plaintiffs can pursue their claim in a single action is the Court of Federal Claims. Accordingly, plaintiffs will not be granted leave to amend their Third Amended Complaint to limit their right to recover in excess of $10,000.

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[15] Prior to passage of the Tucker Act, claims which could be asserted against the United States were extremely limited and had to be brought in the Court of Claims, predecessor to the Court of Federal Claims. *Id.* at 604 n.3; *see also* 14 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3657 at 213 (1976).

Plaintiffs contend that the Little Tucker Act venue provision is inapplicable on the ground that this Court has federal question jurisdiction under one of the alternatives previously addressed and, therefore, the federal question venue provision—28 U.S.C. § 1391—is applicable, not the Little Tucker Act venue provision.[16] Because the Court has addressed and rejected plaintiffs' alternative jurisdiction argument and concluded that jurisdiction is governed by the Tucker Act, the federal question venue provision is inapplicable.

Plaintiffs rely on *Exxon Corp. v. Federal Trade Commission*, 588 F.2d 895, 898-99 (3d Cir. 1978), for the proposition that, because the language of the Little Tucker Act venue provision—28 U.S.C. § 1402(a)—and the federal question venue provision—28 U.S.C. § 1391(e)—is substantially similar, such language should be interpreted in a similar manner. In *Exxon*, the Third Circuit held that, in multiple plaintiff cases under section 1391(e), venue is satisfied where at at least one plaintiff resides in the judicial district. 588 F.2d at 898. Plaintiffs argue that section 1402(a) should be interpreted in a similar manner. The Court rejects this position.

Although the *Exxon* court held that "[t]here is no requirement that all plaintiffs reside in the forum district," in so ruling, the court's major concern was to avoid an unnecessary multiplicity of litigation which would result from a ruling that venue had to be satisfied for each plaintiff. *Id.* at 898. However, *Exxon* is not directly on point whereas *Davila* and its progeny address the precise issue before the Court.

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[16] Section 1391(e) states in relevant part:

> A civil action in which a defendant is an officer or employee of the United States or any agency thereof . . . may, except as otherwise provided by law, be brought *in any judicial district in which . . . the plaintiff resides.*

28 U.S.C. § 1391(e) (emphasis added).

The history and purpose underlying section 1402(a), articulated by the *Davila* court and summarized above, warrant an interpretation which differs from section 1391(e). Moreover, the language of sections 1391(e) and 1402(a) differ in one significant respect. Section 1391(e) permits an action to be brought in *any* judicial district in which the plaintiff resides whereas section 1402(a) is more limited in that it permits an action to be brought *only* in the judicial district where the plaintiff resides. The more restrictive language of the Little Tucker Act venue provision supports this Court's interpretation of section 1402(a).

Finally, the *Davila* court analyzed *Exxon* and concluded that "[i]n light of the unique and purposeful structure of the Tucker Act" the argument that section 1402(a) should be interpreted the same as section 1391(e) was unpersuasive. 600 F. Supp. at 605. In view of the purpose of the Little Tucker Act to provide a convenient forum for adjudication of small claims, multiplicity of litigation could not have been a concern of Congress when the Little Tucker Act venue provision was enacted. Moreover, the *Davila* court pointed out the danger of forum shopping which would exist in cases involving hundreds of plaintiffs from numerous jurisdictions if only one plaintiff satisfied the section 1402(a) residence requirement. *Id.* at 604.

D. *The Court of Federal Claims is Capable of Affording Complete Relief and Count II Will Be Transferred to that Court.*

Plaintiffs' claims for declaratory and injunctive relief in Count II are based on the same facts as plaintiffs' claims for overtime pay and liquidated damages in Count I. Plaintiffs contend that federal district court is the only forum which is competent to adjudicate the claims set forth in Count II of their Third Amended Complaint be-

cause the Court of Federal Claims does not have the power to declare the OPM regulation invalid.

As a threshold matter, the Court concludes that plaintiffs have standing to challenge the OPM regulation under which they were classified as administrative employees. Count II of plaintiffs' Third Amended Complaint states a case or controversy, and plaintiffs allege actual injury as a result of defendants' reliance upon and interpretation of the OPM regulation. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). Moreover, Count II states a claim upon which relief may be granted—improper classification of plaintiffs as administrative employees under the OPM regulation in violation of the FLSA.

Where a claim for money damages against the United States, which is governed by the Tucker Act, is joined with a claim for injunctive or declaratory relief, the test for determining whether the district court can assume jurisdiction over the equitable claim is whether "the declaratory relief a claimant seeks has significant prospective effect or considerable value apart from merely determining monetary liability of the government." *Hahn v. United States*, 757 F.2d 581, 590 (3d Cir. 1985); *accord Matthews v. United States*, 810 F.2d 109, 111 (6th Cir. 1987); *Minnesota v. Heckler*, 718 F.2d 852, 858 (8th Cir. 1983). If the requested equitable relief has such significant prospective effect or considerable value that it, not the compensatory money payments, is the primary relief sought, the district court has jurisdiction over the equitable claim. *Heckler*, 718 F.2d at 859. However, the test articulated in *Hahn* is not intended to derogate from the Court of Federal Claims' sphere of exclusive jurisdiction. 757 F.2d at 590. If the equitable relief does not have such significant prospective effect or considerable value, and the Court of Federal Claims is capable of

affording complete relief, the district court should not permit plaintiffs to avoid bringing their entire action in that court by artful pleading. *Id.*

Although the relief sought in Count II could have some prospective effect or value apart from determining monetary liability of the United States, on the record before the Court, it cannot be said that such prospective effect or value is either significant or considerable. Plaintiffs' equitable claims are not on the level of magnitude of the constitutional claims which were at issue in *Hahn*. *See* 757 F.2d 581. Moreover, the equitable relief sought by plaintiffs in Count II is inextricably intertwined with their claims for overtime pay and liquidated damages in Count I. Finally, plaintiffs' claims for overtime pay and liquidated damages in Count I is the primary relief requested, not the equitable relief sought in Count II. *Heckler,* 718 F.2d at 859.

Plaintiffs are correct that, generally, the Court of Federal Claims does not have the authority to grant prospective equitable relief. *Bowen,* 487 U.S. 879, 108 S. Ct. at 2737 (1988); *Richardson v. Morris,* 409 U.S. 464, 465, 93 S. Ct. 629 (1973). However, the Big Tucker Act was amended in 1972 to give the Court of Federal Claims the authority to grant equitable relief. *See* 28 U.S.C. 1491(a)(2). The Court of Federal Claims' equitable powers are defined as follows:

> To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, . . . and such orders may be issued to any appropriate official of the United States.

29 U.S.C. § 1491(a)(2). Although the equitable powers of the Court of Federal Claims are limited, it is capable of affording complete relief in this case.

The Court of Federal Claims is capable of determining whether, as defendants contend, some of plaintiffs overtime claims were subject to negotiated grievance procedures set forth in the collective bargaining agreement between the parties and, if so, whether plaintiffs must pursue such procedures in lieu of their action in court. *See generally Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir.), *cert. denied*, 111 S. Ct. 46 (1990) (Pursuant to the Civil Service Reform Act, where federal employees are covered by a collective bargaining agreement under which overtime claims are subject to negotiated grievance procedures, the grievance procedures are the exclusive mechanism for resolution of such claims).

The Court of Federal Claims is also capable of determining whether plaintiffs have been properly classified as administrative employees under the FLSA, even if such a determination requires a ruling on the relationship between the OPM and DOL regulations promulgated under the FLSA and a finding that it was inappropriate for the Customs Service to rely on the OPM regulation which plaintiffs contend is more broad than DOL regulations. If the Court of Federal Claims determines that plaintiffs have been improperly classified, that court can order the Customs Service to restore plaintiffs to their appropriate duty status and award plaintiffs any overtime pay which is due and, if warranted, liquidated damages. 28 U.S.C. § 1491(a)(2).

The course adopted by the Court promotes the interest of judicial economy and efficiency by having the entire case adjudicated in one forum. That is preferable where, as here, the Court of Federal Claims can provide complete relief to plaintiffs.

III. CONCLUSION

Having determined that this Court lacks jurisdiction over Count I and, with respect to Count II, having concluded that the Court of Federal Claims is capable of affording complete relief, the Court will transfer Counts I and II of Plaintiffs' Third Amended Complaint to the Court of Federal Claims.

An appropriate order will follow.

[Filed Aug. 4, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 91-5629

FRANK SARACO, HOWARD MARDER,
GARY LEVENSON, CHARLES DUBANO,
RICHARD BOLES, and STEVEN FOREMAN, *et al.*,
Plaintiffs

v.

CAROL BOYD HALLETT, *et al.*,
Defendants

ORDER

AND NOW, to wit, this 3rd day of August, 1993, upon consideration of Defendants' Motion to Dismiss Plaintiffs' Third Amended Complaint (Document No. 47), Defendants' Supplemental Memorandum In Support of Motion to Dismiss Plaintiffs' Third Amended Complaint (Document No. 48), Plaintiffs' Opposition to Defendants' Motion to Dismiss Third Amended Complaint (Document No. 49), Defendants' Second Supplemental Memorandum In Support of Motion to Dismiss Plaintiffs Third Amended Complaint (Document No. 51), Plaintiffs' Response to Defendants' Second Supplemental Memorandum In Support of Motion to Dismiss Plaintiffs' Third Amended Complaint (Document No. 52), Defendants' Motion to Transfer Count I of Plaintiffs' Third Amended Complaint to the United States Court of Federal Claims, In the Alternative to Dismissal (Document No. 57), and Plaintiffs' Memorandum In Opposition to

Defendants' Motion to Transfer (Document No. 60), after a hearing on the Motion to Dismiss Plaintiffs' Third Amended Complaint on December 29, 1992, and for the reasons set forth in the Memorandum accompanying this Order, IT IS ORDERED that Defendants' Motion to Dismiss Plaintiffs' Third Amended Complaint is DENIED and Defendants' Motion to Transfer Count I of Plaintiffs' Third Amended Complaint to the United States Court of Federal Claims, In the Alternative to Dismissal, is GRANTED.

IT IS FURTHER ORDERED that, pursuant to 28 U.S.C. § 1631, and for the reasons set forth in the Memorandum accompanying this Order, Count II of Plaintiffs' Third Amended Complaint is transferred to the United States Court of Federal Claims.

BY THE COURT:

/s/ Jan E. DuBois, J.
JAN E. DUBOIS, J.

[Entered 8/5/93]

APPENDIX E

[Filed Sep. 10, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 91-5629

FRANK SARACO, HOWARD MARDER,
GARY LEVENSON, CHARLES DUBANO,
RICHARD BOLES, and STEVEN FOREMAN, *et al.*,
Plaintiffs

v.

CAROL BOYD HALLETT, *et al.*,
Defendants

ORDER

AND NOW, to wit, this 10th day of September, 1993, upon consideration of Plaintiffs' Motion for Reconsideration (Document No. 62), Defendants' Response to Plaintiffs' Motion for Reconsideration (Document No. 64), and Plaintiffs' Reply to Defendants' Response (Document No. 65), IT IS ORDERED that Plaintiffs' Motion for Reconsideration is DENIED.

The Court's ruling is based on the following:

1. "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or present newly discovered evidence." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985), *cert. denied*, 476 U.S. 1171 (1986). Such motions are not for the purpose of rehashing arguments and facts previously presented. *Keyes v. National Railroad Passenger Corp.*, 766 F. Supp. 277, 280. (E.D. Pa. 1991).

2. In their Motion, although plaintiffs assert their disagreement with the Court's legal interpretations and conclusions, they essentially restate arguments previously raised in their papers submitted in opposition to defendants' Motion to Dismiss and Motion to Transfer, but do not demonstrate any manifest errors of law or fact.

3. In the Motion for Reconsideration plaintiffs cite *Cosme Nieves v. Deshler*, 786 F.2d 445, 447-450 (1st Cir. 1986), as authority for the proposition that the Fair Labor Standards Act ("FLSA") waived the sovereign immunity of the United States. The *Nieves* Court did not so hold. The Court held only that, under the FLSA, the United States has waived the sovereign immunity of non-appropriated fund instrumentalities ("NAFI'S") to suits by its employees to the extent of its non-appropriated funds. 786 F.2d at 449. Therefore, the court's statement that the FLSA waives the sovereign immunity of the United States and federal agencies is dictum.

The *Cosme Nieves* court construed the case as "a[n] FLSA action against a NAFI itself and its non-appropriated funds," 786 F.2d at 448, not an action against the United States. As the case was not considered a suit against the United States, the Tucker Act was not applicable.

Furthermore, in reaching its holding, the *Cosme Nieves* court distinguished NAFI's, revenue producing entities which are not supported with funds from the general treasury, from typical federal agencies which are supported by funds from the general treasury. 786 F.2d at 448-49. Based on that distinction, the court concluded the United States Court of Federal Claims did not have jurisdiction over NAFI's as that court may only render judgments payable from appropriated funds.

4. The Court considered and rejected plaintiffs' argument that the FLSA waives the sovereign immunity of the United States and concluded that the Tucker Act

provided the applicable waiver of sovereign immunity. Mem. at 15-16.

5. Plaintiffs have not set forth in their Motion any law or facts which warrant reconsideration of this Court's Memorandum and Order of August 3, 1993.

BY THE COURT:

/s/ Jan E. DuBois, J.
JAN E. DUBOIS, J.

[Entered 9/13/93]

APPENDIX F

Individuals Who Filed Consent Forms To Become Parties Plaintiff

Ralph D. Acuna
Louis J. Adams
Manuel C. Alvarez
Robert R. Anderson
Ruben Antonetti
Paul R. Anuschat
Juan L. Arroyo
Peter M. Arroyo
Norma C. Ayuso
David C. Bailey
Jose M. Barela
Paul R. Barra
Jack C. Beddingfield
Frank S. Belle
Geraldine Bernard
Barbara L. Bozek
Thomas P. Brady
Weldon C. Brechtel
Linda Bruno
James J. Bruton
Robert J. Butler
Anthony M. Caccavale
Domenico A. Calise
James G. Callahan
Gary M. Capko
Bernard Caplan
Hampton P. Carter
Leo Castro
M. Loretta Cofield
Frances A. Cullier
Marie A. Cosme-Rittenberg
Florencio Cruz
Evelyn Cruz Del Toro
Craig S. Cummings
Benjamin De Jusus
Billy G. Denby
Douglas J. Dloughy
Joe C. Dominguez
Dennis R. Donovan
William A. Donovan
Thomas P. Dorney
Robert N. Dorsch
William W. Elegante
Leopoldo Elizondo
Henry M. Enriquez
William E. Erbe
Linda S. Erickson
John G. Farrell
Milagros Figueroa-Rivera
Eugene E. Fischer-Callejo
Margaret A. Fitzgerald
Lawrence G. Frank
Diane Gainer
Rocky J. Galarza
Hilda E. Garcia
Paul Garretto
Jan E. Garzon
Gary A. Geoffrion
Jesus Gomez
Jose A. Gonzalez
Miguel I. Gonzalez
Adrian Gordon
Reta F. Grant
Olga Grijalva
Patricia A. Gunderson
Norma E. Hanna
Richard J. Haphey
Thomas Haugan

Francis Hernandez
Jose J. Hernandez
Ruel P. Holden
Teresa A. Honan
Kenneth Hooper
Odessa E. Jacocks
Emily Kershules
John W. Kershules
Kenneth L. King
Alfred C. Komorowski
George B. Kowal
Arthur G. Kretchman
Andrew L. Kulp
Jerry Kuperstein
Robert C. Kuster
Jerome K. J. Lai
Evon M. D. Lawson
Augustin A. Leyva
Alfred T. Lopez
Olga I. Lopez-Rivera
Lavonya Macon
Mary K. Magnusson
Edward L. Maher
Sonia Maldonado
Ronal L. Mann
Albert Marcantonio
Molses Marreno-Rivera
Brain G. Martin
Flusa Martinez-Felipe
Salvatore P. Mastropolo
Edward M. Mazique
Donald F. McGettigan
Ernesto T. Medina
Sandra J. Medlock
Carmen C. Mercado
Robert Meyer, II
Noreene B. Morris
Robert D. Mulholland
Joseph Natale
Carmen Nazario-Rivera
Vincent R. O'Campo
Hector A. O'Leal
John R. Oravec
Alfonso J. Orosz
Allen W. Ostrander
John C. Owens
Mary Ann Papernik
Andre C. Pena
Vincent S. Pete
Dagoberto Pinol
John A. Pollard
Leah H. Quatey
William R. Raftery
Edwin Ramos
Nancy R. Rescigno
Bayardo M. Rex
George W. Riggs
Bienvenido Rodriguez
Nick A. Romeo
Grennaro A. Ruggiero
Gregorio G. Salinas
Arturo B. Sanchez
Paula D. Sarlls
Ann E. Scanlan
John F. Schaffer
Erling R. Scheldrup
Raymond M. Scruggs
Lillie M. Sears
Charles R. Sheller
Daniel G. Sherlock
Victoria Silex-Martinez
Olga Silva
Juan J. Sisco
Enrique Solorzano
Kristine G. Sowa
Gerald R. Stachowitz

Walter B. Stevens
Hector D. Suarez-Lopez
Charles W. Supik
Marilyn A. Swayze
Larry P. Tanacredi
Andrew L. Taylor
Cynthia Tedesco-Dimino
Reynaldo te Jada, Jr.
William L. Thurston
Darrell G. Toth
Lee C. Tucker
Frank J. Tufano
Roy E. Urban
Pedro M. Vasquez
Jerry Vicinanza
Hector Vidalez
Ramon Villarin
Marjorie Wainwright
Robert E. Washington
Philip S. G. Watkins
Frederick L. Welborne
William P. Westman
Jeannette Wilson
William J. Winter, Jr.
Charla C. Wong
Carlton A. Yackel
John V. Zeigler
Robert Alvarado
Annette Artis
Aurelio Arzola, Jr.
Patricia Aveitia
Dale C. Brown, Sr.
Sharon A. Brown
Juan J. Castillo
Karl L. Crowe
Emile I. Davis, Jr.
Jeffery R. Davis
Alfred S. Douglas
Donnie M. Eames
Paul T. Ferrer
Isabel Flores, Jr.
George Garcia, Jr.
Richard H. Gattis
Luis A. Gonzalez
Judy L. Goodman
Gary C. Hallonen
Beverly J. Hewitt
Lawrence E. Hilgert
Abraham Irizarry
Robert W. Juszkiewicz
Gloria A. Lambert
John R. Lawless
Alejandro Luna
Donald L. Lynch
Annie R. Meade
Leonard A. Michaud
Michael L. Miller
John F. Mulvihill
Don K. Nelson
Virginia E. Nelson
Oraldo H. Olivas
Bernard A. O'Sullivan
Frank Otero, Jr.
Laurie Paul
Yvonne Powell
Leo W. Quilichini
Ralph E. Quick
Dorothy J. Riley
Reinaldo Rivera-Cruz
George J. Romero
Calvert K. Romney
Manuel Rosario-Molina
Jack J. Russo
Darlene Scarpino
David M. Seeley
Joseph Sharpe

Roger C. Staubs
Gerald A. Tremblay
Benjamin J. Villarreal
Deborah Walsh
Kay Whalen
Frances Allday
Jay Baltuch
Consuelo Barrera
James W. Bean
Moor Braun
Barbara Chambless
Linda Sue Finnerty
Roslyn Haynes
Barbara G. Jarmon
Paul N. Jones
Greg M. Johnson
Frank J. Mudey
Robert E. O'Connor
Kevin Priest
Deborah Robinson
Marva D. Thomas
Luis R. Vassallo
Betty M. Chambers
Charles M. Hawkins
Terri L. Padgett
Carlos A. Aguino
Raul W. Arruyo
Carlos Baco
Hector Caban Santiago
Jose E. Cajigas
Joseph W. Campbell
Crawford W. McAllister
Carmen C. Mercado
Oscar S. Miura
Carlos J. Ortiz
Rosa E. Perez
Gilberto Perez-Otero
Dagoberto Pinol
Rivera-Melendez Cesar L.
Jose A. Rodriguez
Hector D. Suarez Lopez
Felix A. Ramos
Santiago Samuel
Deborah J. Wintjen
Lawrence R. Abramson
John A. Agbayani
Gene B. Agustin
Bonnie Aidelman
Andrew S. Aldana
Oneeta M. Alexander
Alonzo Allen, Jr.
Paul Altiero, Jr.
Avelino Amaya
Susan Amundsen
Vicki D. Anderson
Jane B. Andreachi
Sandra V. Androvich
Melvin J.K. Apo
Stephen H. Appleyard
Roy E. Armstrong
Deborah J. Arrington
Annette Artis
John W. Ashman
Georgia E. Austin
Mark S. Axtman
Scott M. Baran
Geoffrey H. Barrett
Thomas D. Batha
Carolyn B. Baxley
Jeremy E. Baxter
Victoria M. Baxter
Carolyn M. Beaulieu
Paul Beckage, II
Gloria J. Becker
Charlotte J. Belden
William S. Bell
Doreatha Benn

Lawrence C. Bennett
Donald M. Benton
David Berkofsky
Lester S. Bevil
Judy Bidwell
Linda L. Birmingham
Sandra G. Black
Ricardo F. Blancas
Scott M. Bober
Ricardo F. Bowen
Don W. Bolding
Martin L. Bond
Dennis L. Boorsma
Robert W. Borkowski
George Bredsten
John F. Brooks
John J. Brothers
Alfred W. Brown
Gordon A. Brown
Henry Brown
Rodney Brown
Guido M. Brunetti
Joyce E. Bryant
Sharron L. Bryant
John E. Bundy
Domenick J. Buonocore
Noel T. Burke
Susan L. Buruca
Robert J. Caffrey
Helena V. Caldwell
Robert G. Caldwell
John H. Callaway
Patrick V. Caputo
John A. Carman
Juan M. Casas
Wallace F. Cash, Jr.
William Cash
Donald R. Cates
Richard W. Caudill
William M. Celentano
Gino R. Cerreta
Arturo Chacon
Mary L. Chantiny
William J. Chula
Louis R. Cirotti
Donna L. Ciryak
Robert D. Clark
Thomas J. Clarke
Franklin P. Clayton
Joan M. Cobb
Michael A. Colon
Donald J. Conroy
Robert S. Contrada
Kathleen M. Conway
James D. Cooper
Abraham Cordero
Charles L. Corn
Antolina Cotto
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Librado Cruz
Rafael F. Cuevas
Patrick J. Cullinane
Edward F. Curley
James J. Curtin
Charles P. Cutter
Eugene A. Daly
Weston S. Daniel
Sandra L. Darrall
Dolores Daversa
Lonnie J. Davey
Raymundo Davilla
David I. Dawley
John R. Day
Michael C. Day
Gwendolyn A. Debose
Darryl Delaune
Collette T. Dennehy
Laura Denny

Robert J. Dering
Donald A. Deturck
John M. Devine
Tommie L. Dillard
Harry M. Dittmyre
Dennis J. Doherty
Charles F. Dolan
Louis J. Dominico, Jr.
Jonathan J. Donaghy
Albert J. D'Onofrio
Mark R. Dougherty
James J. Duffy
Maribeth Dunajski
John E. Duncan
Bernard G. Durnan
Jerome H. Dziura
Terry L. Estell
Jose A. Estrada
Victor C. Fagerroos
Alberto J. Farias
Alan B. Feingold
Michael J. Felger
Yvonne M. Fellegara
Gregory E. Ferby
Carlos Fernandez
Milan Ferry
Ronald E. Ferry
Frederick N. Ferzetti
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Conchita L. Fielding
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Greg B. Floto
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Peter A. Forttrell
George J. Foster
Edward T. Fox
Henry L. Franzki
Robert Frassa
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Colin R. Frazier
Patrick M. Frink
Theodore P. Fronckowiak, Jr.
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Richard A. Fuller
Martha L. Fulmer
Steve Fung
Robert A. Furlani
Marc Futterman
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Raul R. Garcia
Sylvia Garcia
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Thomas F. Geary
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Robert M. Gordon
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Lee W. Griffin
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Warren A. Hall
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Dale D. Peterson
Felice A. Pitirri
James K. Place
Anthony B. Poli
Theresa A. Pool
Jose F. Preciado
Frank C. Preston
Francis Pysz
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Richard J. Rinaldi
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Javier Rodarte
Jose A. Rodriguez
Salomon Rodriguez, Jr.
Carlton A. Roe
Joyce H. Rogers
Rolando F. Roman
Robert Rugnetta
Ricardo Ruiz
Paul Russo
Robert J. Ryan
Susan A. Ryder
Vicki Ryen-Hudson
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Jorge Salazar
Arthur M. Salzman
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Eric D. Schaefer
Larry M. Schlueter
John A. Schmahl
Richard F. Schmidt
Robert L. Schmidt
Frank J. Schmutz
Lew A. Schoeneman
John F. Schoenfeld
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Daniel T. Sheehy
Harry B. Shelvock
Joseph Shepard
James J. Sheridan
Paul G. Shock
Jon F. Shulmire
Georgie C. Silva
Barbara J. Singer
Fred J. Sirois
Peter E. Sirockey
Ceclephus Skinner
Betty H. Small
Robert H. Small
Darrell W. Smith
Wayne L. Smith
Allen L. Soop
Thomas B. Soriano
Finley M. Soule
Akron K. Souza
Bernard Sovitsky
Gary G. Speckhard
George F. St Clair
Robert A. St John
Samuel J. Stacey
John H. Stass
John C. Stazel
Lee Stevenson
James M. Stewart
Robert A. Stone
Kenneth Strominger
Ronald C. Strozyk
Alfred C. Swift
Howard F. Swinimer
David J. Sylvain
Thomas W. Syp
Frank X. Tague
Harry Takune
Jay R. Tallent
William Tamashire
Richard T. Tannahill
Daniel E. Tauken
James T. Tessenear
Jean Thomas
Jewell S. Thomas
Luther Thomas
Robert A. Thompson
Robert M. Thredt
Mario E. Tilelli
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Paul T. Uchianura
Anthony J. Valecce
Albert M. Valgado
Javier R. Vela

Larry E. Vernon
Louis Verona
Hector Vidalez
Patrick A. Vigliante
Santiago Villa
John Villano
J.J. Villarreal
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Roby L. Whittaker, Jr.
Timothy Thomas Willard
Tamashire William Y.
Howard S. Williams
Charles E. Williamson
Michael S. Willis
Ronald E. Winburn
Stanley J. Wink
Peggy J. Winnie
Brenda P. Winslow
Robert S. Winslow, Jr.
Robert J. Wolf
Kalfred K.T. Wong
James Wong
Forrest Yeaton
Clifford M. Yoshimura
Leslie C.H. Young
Gary M. Ziegler
Alfred G. Zimmerman
Salvatore Zito
Bernard Zwolinski

APPENDIX G

STATUTORY PROVISIONS

28 U.S.C. 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. 1346

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

* * * *

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

29 U.S.C. 216

* * * *

(b) Any employer who violates the provisions of section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.